U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALEXANDER A. ZIBURTOVICZ and DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

Docket No. 00-2623; Submitted on the Record;
Issued November 19, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On October 2, 1975 appellant, then a 28-year-old machine tool operator, was injured at work when he slipped and fell against a pump housing. The Office accepted the claim for a left hip contusion, low back strain and abdominal strain.[1] Appellant worked intermittently from the date of injury until 1980, at which time he stopped work and began receiving compensation on the permanent rolls.

In an October 16, 1997 report, Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and an Office referral physician, stated that appellant had chronic nonspecific low back pain associated with spondylolysis at L5, bilaterally. Dr. Swartz opined that appellant's back condition was no longer related to his work injury and that the residuals of his work injury had long ago healed.

Dr. Gilbert responded to Dr. Swartz's report on March 3, 1998, noting that appellant did not have a problem with his back until the October 2, 1975 work injury. He reported that appellant's physical findings included restricted range of motion in the lower back, flexion and side bending. He concluded again that appellant's back complaints were due in part to the work injury.

Based on the conflict in the medical evidence between appellant's treating physician and Dr. Gilbert, the Office referred appellant for an impartial medical evaluation with Dr. Lawrence S. Guinney, a Board-certified orthopedic surgeon, on February 15, 1999. In a report dated February 16, 1999, Dr. Guinney reviewed a copy of the medical record and a

[1] Concurrent conditions that were not found by the Office to be work related include spondylolysis L5-S1 and vetigo-Meniere's syndrome.

statement of accepted facts. He noted physical findings and found that appellant sustained a soft tissue contusion and low back strain as a result of his work injury on October 2, 1975. The physician concluded that appellant's current physical limitations were due to preexisting spondylolysis and vertigo, which were nonindustrial in nature. Dr. Guinney added that appellant had reasonably recovered from his work injury and that he was capable of working within certain physical restrictions.

On March 25, 1999 the Office issued a notice of proposed termination of compensation based on the findings of an impartial medical examiner that appellant's October 2, 1975 work injury had resolved.

In a decision dated April 27, 1999, the Office terminated appellant's compensation effective May 1, 1999.

On April 27, 2000 appellant, by counsel, filed a request for reconsideration. Appellant subsequently submitted a report from Dr. Gilbert dated March 27, 2000 to support his reconsideration request.

In his March 27, 2000 report, Dr. Gilbert states: "It is his my opinion that appellant could not return to the work that he was doing in the shipyards prior to his back injury, in spite of Dr. Guinney's comment that he is recovered from that injury at this time. He continues to require mobilization of his spine from time to time. This is not curative but palliative." Dr. Gilbert reiterated that appellant's back symptoms did not occur until after his work injury, "therefore the presence or absence of spondylolisthesis does not necessarily figure in [to his disability]."

In a May 15, 2000 decision, the Office denied appellant's request for reconsideration. The Office found the report of Dr. Gilbert to be cumulative and therefore insufficient to warrant a merit review.

The only decision before the Board on this appeal is the Office's decision dated May 15, 2000. The Board's regulations provide that an appeal must be filed within one year from the date of issuance of a final decision of the Office.[2] Since more than one year elapsed between the date appellant filed his appeal on August 16, 2000 and the April 27, 1999 Office decision, the Board lacks jurisdiction to review whether the Office properly terminated appellant's compensation.

The Board finds that the Office properly denied appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act[3] vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[4] The regulations provide that a claimant may obtain review of the merits of the

[2] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 5 U.S.C. §§ 8101-8193; § 8128(a).

[4] 5 U.S.C. § 8128; *see Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[5] When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[6] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[7] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[8]

The Board finds that appellant failed to show that the Office erroneously applied or interpreted a point of law. He did not advance on reconsideration a relevant legal argument not previously considered by the Office; and he did not submit relevant and pertinent new evidence to warrant a merit review. The only evidence proffered by appellant on reconsideration was a report from his treating physician which simply restated his position that appellant's work-related strain had not resolved. As noted by the Office, however, Dr. Gilbert's opinion was previously considered and served as the basis for creating a conflict in the medical record. His recent report adds nothing additional to the record and is merely cumulative and repetitive evidence.[9] Consequently, appellant has failed to satisfy the requirements of section 8128 of the Act and is not entitled to a merit review.

[5] 20 C.F.R. § 10.606(b) (1999).

[6] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[7] *Edward Matthew Diekemper*, 31 ECAB 224 (1979)

[8] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[9] Evidence that repeats of duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; *see Paul Kovash*, 49 ECAB 350 (1998); *Richard L. Ballard*, 44 ECAB 146 (1992).

The decision of the Office of Workers' Compensation Programs dated May 15, 2000 is hereby affirmed.

Dated, Washington, DC
November 19, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member